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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JAMES S. GORDON, JR., Plaintiff, vs. IMPULSE MARKETING GROUP, INC., Defendant, IMPULSE MARKETING GROUP, INC., Third-Party Plaintiff, vs. BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT, EMILY ABBEY, and LEW REED, Third-Party Defendants.	)	**No. CV-04-5125-FVS**

DECLARATION OF JAMES A. BODIE IN OPPOSITION TO PLAINTIFF'S AND THIRD-PARTY DEFENDANTS' MOTION TO DISMISS IMPULSE MARKETING GROUP, INC.'S AMENDED COUNTERCLAIMS AND THIRD-PARTY AMENDED COMPLAINT

James A. Bodie, being duly sworn, deposes and says, upon information and belief:

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1. My name is James A. Bodie and I am the General Counsel for Impulse Marketing Group, Inc. ("Impulse").

2. I submit this declaration in opposition to the motion of plaintiff James Gordon ("Gordon") and third-party defendants Bonnie Gordon, James S. Gordon, III, Jonathan Gordon, Jamila Gordon, Robert Pritchett and Emily Abbey (hereinafter, the group of third-party defendants will collectively be defined as "Third-Party Defendants" and the group of Gordon and Third-Party Defendants shall collectively be defined as "Plaintiff")[1] to dismiss Impulse's Amended Counterclaims and Third-Party Amended Complaint pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6), 56, or 9(b) (the "Motion").[2]

Gordon Lacks Standing to Bring Motion to Dismiss on Behalf of Third-Party Defendants

3. Gordon lacks standing to bring the Motion on behalf of Third-Party Defendants because: (1) Gordon does not have a personal stake in the outcome of the third-party action; (2) there is no direct relationship between the claims asserted against Gordon and those brought against Third-Party Defendants; (3) Gordon cannot bind Third-Party Defendants to his representations, admissions and positions; and (4) the interests of Gordon and Third-Party Defendants including, but not limited to, certain defenses that may be raised in support of the amended counterclaims and third-party causes of action, may vary.

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[1] Officer Reed has not been served with the third-party amended complaint. The Court will entertain Impulse's motion to dismiss Officer Reed from the third-party action as Gordon refused to stipulate to his dismissal.

[2] Gordon has improperly moved to dismiss Impulse's Third-Party Amended Complaint on behalf of Third-Party Defendants. Gordon lacks standing to impose arguments on behalf of Third-Party Defendants. Gordon's interests may be contrary to the interests of Third-Party Defendants. Further, Gordon is not permitted to bind Third-Party Defendants to his own positions and arguments.

4. Further, there is no indication that Gordon's counsel has appeared on behalf of Third-party Defendants.

5. Based on the foregoing, Third-Party Defendants have not issued an appearance in the third-party action.

Procedural History

6. In 2003, Gordon filed an action against Commonwealth Marketing Group, Inc. ("CMG") (the "Related Action").

7. To the extent any e-mails referenced in Gordon's complaint are indirectly attributable to Impulse, said e-mails were transmitted by CMG.

8. On November 23, 2004, Gordon filed the instant lawsuit against Impulse (the "Instant Action").

9. Gordon and his attorney have filed multiple actions against various defendants using similar, if not identical, theories of recovery in each action.

10. On or about January 21, 2005, Impulse moved to dismiss the Instant Action, as a matter of law, pursuant to F.R.C.P. 12(b)(6).

11. This Court denied Impulse's motion to dismiss Gordon's complaint on or about July 11, 2005.

12. On August 1, 2005, Impulse filed five (5) counterclaims against Gordon and five (5) separate causes of action against each of the Third-Party Defendants.

13. On September 7, 2005, Impulse filed Amended Counterclaims against Gordon and a Third-Party Amended Complaint against each of the Third-Party Defendants (collectively, "Claims").

14. In the Instant Action, Plaintiff argues that: (1) no factual basis exists for Impulse's Claims; and (2) even if one assumes the truth of all of Impulse's factual allegations contained in its Claims, Impulse still fails to state claims upon which relief can be granted.

15. Notwithstanding Impulse's amended Claims, on September 12, 2005, this Court ordered that the Plaintiff's prior submission applied to Impulse's amended pleadings.

Introduction

16. As stated above, Gordon has no standing to argue or bring the Motion on behalf of Third-Party Defendants.

17. As such, Third-Party Defendants have not appeared in Impulse's third-party action.

18. Despite Gordon's lack of standing to bring the Motion on behalf of Third-Party Defendants, and although Third-Party Defendants have not appeared in the third-party action, out of an abundance of caution, Impulse will oppose the Motion in its entirety.

19. As indicated above, any reference to "Plaintiff" shall be used to encompass Gordon and each Third-Party Defendant.

20. Impulse has sufficiently alleged facts tending to show that Plaintiff has engaged in wrongful conduct by: (1) "untruthfully and inaccurately," "actively and affirmatively" soliciting commercial e-mail for the sole purpose of filing multiple lawsuits arising out of the receipt of such e-mail messages; and (2) fraudulently misrepresenting his identity to Impulse in violation of the terms and conditions (the

"Agreement") of the USA Gold Card program (the "Program") (hereinafter, the "Scheme").

21. Such improper conduct subjects Plaintiff to actionable Claims for fraud and deceit, tortious interference with business relationships, breach of contract and injunctive relief.

22. The Program allows individuals to apply for a USA Gold Card online and, upon acceptance of their application, use their USA Gold Card to shop online and purchase products offered by USA Shop Smart and receive pre-approval for an unsecured Visa credit card.

23. Notwithstanding Plaintiff's improper conduct, material questions of fact are raised based upon the allegations contained in Impulse's amended pleadings as well as Gordon's own representations and contradictions made in the Related Action and the Instant Action.

Material Questions of Fact Exist That Preclude Summary Judgment

24. Notwithstanding Impulse's well-plead facts, Gordon's declaration dated August 15, 2005 in support of the Motion (the "Gordon Declaration") by itself raises material questions of fact.

25. The Gordon Declaration asserts, under penalties of perjury, that Gordon created numerous e-mail addresses by fictitiously using the names of his friends and family members that he identified as witnesses in his Initial Disclosures in the Related Action (the "Gordon Initial Disclosures"). See Exhibit "A" ¶3, annexed hereto for a copy of the Gordon Initial Disclosures in the Related Action.[3]

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[3] This Court has already taken judicial notice of the Related Action in its Order Denying Defendant's Motion To Dismiss, dated July 11, 2005.

26. Although the e-mail addresses related to Gordon's family members, all of the e-mail addresses were purportedly "created and maintained" by Gordon, and e-mails sent to any of those e-mail addresses were "received" by Gordon himself. See Exhibit "A" ¶7 (emphasis added).

27. Gordon "used" certain e-mail addresses that belonged to his family and other witnesses. See Exhibit "A" ¶9.

28. By contrast, the Gordon Initial Disclosures in the Related Action reveals a material and factual inconsistency.

29. Specifically, the Gordon Initial Disclosures state that Gordon's family members, Pritchett and Abbey Gordon, rather than Gordon himself, received commercial e-mail. See Exhibit "A" ¶¶2-7 (emphasis added).

30. As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raise triable issues of material fact in the Instant Action including, but not limited to, whether or not Gordon and/or Third-Party Defendants received the commercial e-mail messages at issue in the Instant Action; whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information in violation of the terms of the Agreement; and whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners.

Exhibit "F" of the Huston Declaration, dated January 21, 2005

31. Gordon relies on the Exhibit "F" (a list of dates and websites of when and where Gordon and/or his family members demanded that e-mail be sent to them) of the

Declaration of Phil Huston, dated January 21, 2005 (the "Huston Declaration") in support of Impulse's F.R.C.P. 12(b)(6) motion to dismiss Gordon's complaint as evidence that Impulse somehow sent e-mail after someone requested that e-mail stop being transmitted.

32. However, Gordon's interpretation of the Huston Declaration and Exhibit "F" is entirely mistaken.

33. Contrary to Plaintiff's representations, Exhibit "F" does not reflect that Gordon and/or his family members "opted-out" to receiving "all" e-mails.

34. Rather, Exhibit "F" of the Huston Declaration supports the proposition that "some" of the e-mails had been requested to be stopped being transmitted.

35. Nevertheless, a question of fact arises as to if and when Gordon and/or his family member's "opted-in" again after such "opt-out" occurred.

The Declaration of Eric Castelli, co-founder and Chief Technology Office of LashBack LLC, dated August 10, 2005

36. In support of Plaintiff's Motion, Eric Castelli, co-founder and Chief Technology Office of LashBack LLC ("Lashback") submits a declaration (the "Castelli Declaration").

37. However, the Castelli Declaration must be discredited based upon Lashback's motives.

38. Lashback was formerly one of Impulse's marketing affiliate partners.

39. Accordingly, Lashback at one time had access to Impulse's suppression lists.

40. In March of 2005, someone or some entity with access to Impulse's suppression lists misappropriated Impulse's suppression list without its knowledge or

consent and may have transmitted communications to the e-mail addresses contained on that suppression list.

41. In June of 2005, Lashback published information on the Internet indicating that Impulse had sent one hundred sixty-seven (167) unsolicited commercial e-mails.

42. Of these one hundred sixty-seven (167) e-mails wrongly alleged to have been transmitted by Impulse, Lashback published supporting documentation that only related to one particular e-mail.

43. Despite Lashback's false representations, said information clearly indicates that Elbicho Limited, 26 Fremantle Court, Harbour Views, Gibraltar transmitted the e-mail, not Impulse.

44. The above referenced documentation may be viewed at the following website:http://www.lashback.com/intel/EmailIntelURIInfo.aspx?Action=MOSTRECENTEMAIL&UnsubscribeViolationID=499218.

45. In response to Impulse's request that Lashback provide it with documentary evidence supporting such a representation, Lashback refused to provide Impulse with documentation relative to any other alleged "spam violations" unless Impulse purchased Lashback's monitoring services.

46. Impulse declined Lashback's solicitation to purchase its monitoring service.

Gordon's Malfeasance

47. Plaintiff's malfeasance is demonstrated by the fact that he provided Impulse and/or its marketing partners with "inaccurate and untruthful" information in violation of the USA Gold Card program terms and conditions.

48. Contrary to Gordon's representations that he never demanded to receive e-mail, Plaintiff has repeatedly provided Impulse with his express request to receive the e-mails at issue while, at the same time, subjectively believing that the e-mails he allegedly received violated R.C.W. §19.190 et seq. and all the while intending to sue Impulse and/or its marketing partners.

49. Based on the foregoing, Plaintiff's hands are unclean.

50. I certify and declare, under penalty of perjury, that the foregoing is true and correct to be best of my knowledge and belief.

Dated this 23rd day of September, 2005.

James A. Bodie

Sworn and subscribed before me this 23rd day of September, 2005.

Notary Public 29Apr09